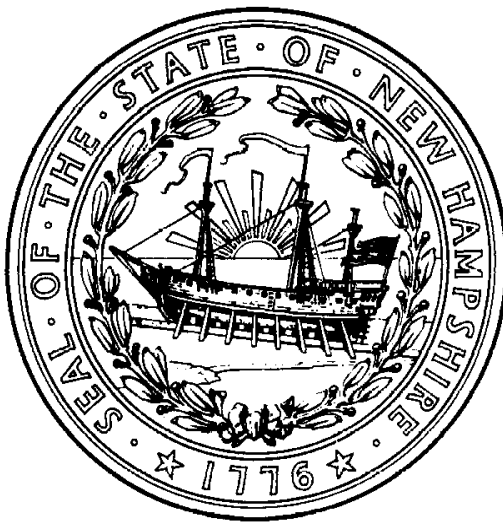


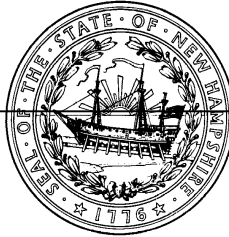
**In re: W. Stephen Thayer, III and Related Matters**



**Report of the Attorney General**

**ATTORNEY GENERAL  
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CONCORD, NEW HAMPSHIRE 03301-6397

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March 31, 2000

Her Excellency, Jeanne Shaheen  
Governor, State of New Hampshire  
State House  
Concord, NH 03301

The Honorable Beverly A. Hollingworth  
President of the Senate  
State House, Room 302  
Concord, NH 03301

The Honorable Donna Sytek  
Speaker of the House  
State House, Room 308  
Concord, NH 03301

Re: New Hampshire Supreme Court

Your Excellency, Madam President and Madam Speaker:

On February 25<sup>th</sup> I was presented with a memorandum written by Howard Zibel, the Clerk of the New Hampshire Supreme Court. Since February 25<sup>th</sup> my office has been engaged in an active and intense investigation into the allegations and concerns first presented in that memorandum. Last week our investigation led us to prepare to convene the Merrimack County Grand Jury. Stephen Thayer was the named target of the Grand Jury. Through counsel Justice Thayer replied to a letter informing him that he was a target of a grand jury investigation. On March 29<sup>th</sup>, after discussions between Justice Thayer's attorneys and prosecutors in my office, Justice Thayer tendered his resignation to me for delivery to the Governor on Friday, March 31.

Stephen Thayer's resignation terminates a criminal investigation which revealed institutional practices of the Supreme Court which, in my judgment, as the attorney for the people, should be examined. The mechanism and form of

examination and the extent to which my office has an obligation to disclose our investigative findings have been the subject of discussion. The discussion has presented one fundamental question: To whom and for what are we accountable. The answer is best addressed by reference to our Constitution.

The Constitution is the people's law, and the people, having established three separate but equal branches of government, have provided that their disputes shall be resolved by judges. In return for delegating to judges extraordinary power the people require from judges extraordinary fidelity and have eloquently expressed their expectation of the judiciary and of judges in our Constitution where they provided that:

**[Art.] 35. [The Judiciary; Tenure of Office, etc.]** It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme judicial court should hold their offices so long as they behave well; subject, however, to such limitations, on account of age, as may be provided by the constitution of the state; and that they should have honorable salaries, ascertained and established by standing laws.

From time to time judges have personal interests in matters that are before them. Sometimes judges are parties to a lawsuit. In such cases it is expected that judges will recuse themselves. To recuse means to disqualify. To disqualify means that a judge has no more authority than any other citizen to make case-related substantive or procedural decisions. Practices to the contrary are unconstitutional because when they occur the result is something other than an impartial interpretation of the laws and administration of justice. Our investigation has discovered conduct and institutional practices at the Court at odds with the expectations of the people to whom the court belongs. Mindful of the wisdom of dividing the powers of government, the people also provide in the Constitution that:

**[Art.] 37. [Separation of Powers.]** In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

If abuses of process occur in one branch of government then, absent the ability of that branch of government to self correct, it is the duty of the other branches to protect the interests of the people in the integrity of their government.

The Constitution further provides that:

**[Art.] 8. [Accountability of Magistrates and Officers; Public's Right to Know.]** All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

It is our conclusion that we must make an accounting to the House and Senate, as the elected representatives of the people, of all that we have discovered in the course of our investigation. Our report follows.

Sincerely,

Philip T. McLaughlin  
Attorney General

PTM/der

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## History of the Investigation

On February 25, 2000, Chief Justice Brock's personal attorney delivered a memorandum to Attorney General McLaughlin. The memorandum was not signed and its author was not identified within the document. The document appeared to have been written by Howard Zibel, the clerk of the Supreme Court. Chief Justice Brock's lawyer later confirmed that fact to members of the Attorney General's Office. The document is referred to in this report as "the Zibel memorandum."

The Zibel memorandum alleged that during the last year its author had witnessed and learned of a number of potential violations of the rules of judicial conduct by members of the Supreme Court. The memorandum included allegations that Justice W. Stephen Thayer, III had: (1) argued an interested party's position to the Court in *Feld's Case*, a matter in which he had disqualified himself without disclosing to the Court his financial relationship with the interested party; (2) misrepresented his practices as a recused justice in oral statements to the Judicial Conduct Committee; (3) participated in private conferences on proposed amendments to the procedural rules of the Judicial Conduct Committee while a complaint against him was still pending before that body, and (4) tried to influence the Chief Justice's selection of judges to hear the appeal in the matter of *Thayer v. Thayer* by objecting to the selection of retired Superior Court Justice George Pappagianis.

The Zibel memorandum further alleged that this last act was the crime of improper influence. The crime of improper influence is committed when a person

Privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law;

RSA 640:3, I (b).

When he delivered the Zibel memorandum to the Attorney General, the Chief Justice's attorney did not elaborate on the charges made in the memorandum, other than to state that the Chief Justice did not personally believe that the conduct described in the memorandum constituted a crime.

On March 2, 2000, Attorney William Saturley, acting as legal counsel to the Judicial Conduct Committee (JCC), met with Attorney General McLaughlin. The purpose of the meeting was to make an oral referral of potential criminal conduct to the Attorney General based on some of the same facts stated in the Zibel memorandum.

The conduct alleged in the Zibel memorandum also implicated the Chief Justice in several potential violations of the New Hampshire statutory law and the Code of Judicial Conduct. The Zibel memorandum disclosed: (1) the Chief Justice allowed Justice Thayer, a recused member of the court, to participate in deliberations on *Feld's Case*; (2) the Chief Justice discouraged Zibel from filing a complaint about the matter, asserting that the secrecy of the court's deliberations took precedence over adherence to the canons of judicial conduct; (3) the Chief Justice invited Justice Thayer, a party and a recused member of the court, to express his opinions about whom should be appointed to sit as temporary justices on the appeal from the Superior Court's final order in the Thayer divorce proceedings and (4) the Chief Justice acted upon Justice Thayer's request not to appoint retired Superior Court Judge George Pappagianis to the Thayer divorce panel, to the extent of asking Zibel not to call Judge Pappagianis.

Attorney General McLaughlin assigned members of his staff to investigate the allegations against Justice Thayer. Deputy Attorney General Steven Houran and Senior



Assistant Attorney General Daniel Mullen had previously begun to represent the court and its members in proceedings in federal court, so Attorney General McLaughlin instructed members of the investigative team not to share information or documents with them or vice versa. In order to preserve the confidentiality of the investigation, General McLaughlin instructed members of the investigative team not to discuss their activities with other members of the Attorney General's Office except on a limited basis with senior members of the office, all of whom who would be screened from any involvement in the civil case. General McLaughlin directed the investigative team and screened himself from all aspects in the civil case.

Members of the investigative team first interviewed Mr. Zibel. He confirmed that he wrote the memorandum. The team then interviewed Eileen Fox, the Supreme Court's legal counsel, retired justice William Batchelder and retired justice William Johnson. Those interviews corroborated the substance of the Zibel memorandum. Based on those interviews, Attorney General McLaughlin and the investigative team determined that there were reasonable grounds to believe that Justice Thayer had violated one or more criminal laws. The investigative team decided to broaden the investigation by interviewing the members of the Court. Before doing that Attorney General McLaughlin notified the Governor, Speaker, Senate President and Senior Associate Justice Linda Dalianis of the Superior Court, of the fact that he was beginning an investigation that might require them to exercise their supervisory or constitutional powers. He asked for their cooperation in preserving the confidentiality of his investigation. It is worth noting here that they honored that request, and the Attorney General is grateful for their help.

The investigative team interviewed the three sitting justices of the Supreme Court between March 9, and March 24, 2000. All three judges, like all other witnesses, cooperated in the investigation, consenting to be interviewed and re-interviewed. Investigators told Justice Thayer's counsel that he was the target of their investigation, and he declined their invitation to be interviewed. Justice Nadeau was appointed to the court after the events under investigation, had no knowledge of the events, and was not invited to be interviewed.

### ***Disqualification***

The Code of Judicial Conduct requires a judge to disqualify himself in a proceeding in which his impartiality might reasonably be questioned. This requirement is found in Canon 3.C of the Code of Judicial Conduct. The Code requires a judge to disqualify himself or herself in several circumstances, including instances where the judge has a personal bias or prejudice concerning a party, is a party to the proceeding, or has a financial interest in the outcome of the dispute.

Investigators learned that, contrary to the perception that a recused justice takes no part in deciding procedural or substantive issues in cases where they are recused, the reality on the New Hampshire Supreme Court was far more complicated. Under long-standing practices of the court, recused justices received draft opinions in cases from which they had recused themselves. Under that same practice, recused justices would offer editorial comments to improve the quality of the final opinion. Although the present and former members of the court were unable to state clearly how often recused judges had done so, they all told investigators that such editorial comments were made by recused justices.

### **Deliberations on *Feld's Case***

*Feld's Case* grew out of a dispute between Attorney Emile Bussiere and members of the Roberge family over real estate in Manchester. During the course of that dispute the Roberge's lawyer, Steven Feld, took actions that Attorney Bussiere claimed to be in violation of the ethical rules that govern lawyers' professional conduct. The Professional Conduct Committee (PCC) petitioned for the disbarment of Attorney Feld. The Supreme Court appointed a retired judge to sit as a "master" to hear evidence in the matter. The master ordered that Attorney Feld be publicly censured for his actions, but not disbarred. The PCC, which had sought the penalty of disbarment, and Attorney Feld, who claimed that he had not violated the rules of professional conduct, both appealed to the Supreme Court.

Justice Thayer had disclosed a longstanding personal relationship with Attorney Bussiere. It was widely understood that Attorney Bussiere had a substantial interest in the outcome of Attorney Feld's disciplinary proceedings because he filed the complaint against Attorney Feld with the PCC and participated in PCC proceedings. In accordance with his longstanding practice, therefore, Justice Thayer disqualified himself from sitting on Attorney Feld's case. In addition, Justice Broderick disqualified himself because of his long personal relationship with Attorney Feld's counsel and Justice Horton disqualified himself because of his prior professional involvement as legal counsel to a bank in the underlying real estate matter.

Thus only Justice Johnson and the Chief Justice could hear the case. Under applicable law three justices of the court are required to hear and decide a case. The Chief Justice exercised his legal authority under RSA 490:3 to appoint retired justice William Batchelder as a temporary justice to sit on the case.

After oral arguments, Justice Johnson was assigned to draft the Court's opinion. Justice Johnson told investigators that shortly after the case was assigned to him, Justice Thayer asked him to expedite the process of drafting the opinion because he was concerned for Attorney Bussiere's health. Justice Johnson did not believe that the request was inappropriate. Justice Johnson drafted an opinion affirming the decision of the master, which ordered public censure, but not disbarment, of Attorney Feld.

Although Justice Johnson did not believe that it was inappropriate for Justice Thayer to ask for expedited treatment of the case, he took a different view of Justice Thayer's participation in the "case conference" where the draft opinion was discussed. The Chief Justice, along with Justices Johnson, Horton, Broderick and Thayer were present at the private conference. Justice Thayer pressed a legal argument that the Court had been too lenient on Attorney Feld, and should have imposed a stiffer penalty than the master had.

After the case conference, but before the opinion was published, Justice Thayer amended financial disclosure forms on file with the court clerk to disclose that Attorney Bussiere had made a personal loan to him. Justice Johnson reported that he was upset that the draft opinion had been discussed in front of disqualified members of the court and that Justice Thayer had tried to influence the Court's decision. Justice Johnson expressed his concerns to Mr. Zibel. He later went to the Chief Justice, told him that should not be discussed in front of the whole court and asked whether Justice Thayer's conduct should be referred to the JCC for investigation.

Both Justice Johnson and the Chief Justice told investigators that the Chief Justice discouraged Justice Johnson from filing a complaint with the JCC over the matter. The Chief Justice told Justice Johnson that the disclosure of the financial relationship between Justice

Thayer and Attorney Bussiere did not change the vote of either the Chief Justice or Justice Johnson on the decision in *Feld's Case*. According to both Chief Justice Brock and former Justice Johnson, the Chief Justice discouraged Justice Johnson from referring the matter because in his view it was more important to preserve the secrecy of the judges' conference, and the confidentiality of comments made by the judges in conference. The Chief Justice did order that the case be discussed again in conference, this second time with former Justice Batchelder participating and without the disqualified justices.

Both the Chief Justice and Justice Horton noted that during the Claremont cases, the Chief Justice had carefully shielded Justice Thayer, who had disqualified himself, from any conferences where procedural or substantive issues were discussed.

### **Analysis**

The Attorney General determined that no criminal charges would be brought against Justice Thayer for his comments to Justice Johnson and the Chief Justice on *Feld's Case*. The two criminal statutes that arguably apply to these circumstances are the improper influence and official oppression statutes. Improper influence did not apply to these circumstances because the witnesses all agreed that Justice Thayer presented a legal argument to his colleagues, and thus was not clearly trying to influence the decision of the Court "on the basis of considerations other than those authorized by law," RSA 640:3, I(b).

Similarly, a charge of official oppression would not lie in these circumstances. Justice Thayer had a personal and financial relationship with Attorney Bussiere, but there was no evidence that Justice Thayer would benefit from the disbarment of Attorney Feld and there was no evidence that Justice Thayer was motivated to make his comments from a desire to

cause personal harm to Attorney Feld. See RSA 643:1 (mental state element requires that public official act with purpose to benefit himself or harm another).

### **Justice Thayer's Comments to JCC**

Mr. Zibel took notes during an appearance by Justice Thayer before the JCC during the summer of 1999, after the conference where Justice Thayer had expressed his opinions about the Court's decision in *Feld's Case*. Justice Thayer appeared before the committee informally, and he was not sworn as a witness. Mr. Zibel's notes confirm his memory that members of the JCC asked Judge Thayer why his failure to disclose a loan that he had received from Attorney Bussiere did not violate the canons of judicial conduct. The notes also confirm Mr. Zibel's memory that Justice Thayer said that the failure to disclose the loan was irrelevant because he did not "sit" on cases involving Attorney Bussiere, which was the same action he would have to take if he had disclosed the loan.

Mr. Zibel was aware of Justice Johnson's concerns about Justice Thayer's participation in that case, and he believed that Thayer's comments to the JCC were misleading if not false in light of his comments on *Feld's Case*. He also reported concern to the Chief Justice.

### **Analysis.**

Although Justice Thayer's comments to the JCC were inaccurate, they were beyond the reach of the laws governing falsification in official matters because they were not sworn (required for a perjury or a false swearing charge) and were oral (written statement required for a charge of unsworn falsification).

### **Justice Thayer's Comments on Proposed JCC Rules**

During 1999 the Court, with the help of its counsel, Eileen Fox, drafted and obtained public comment on proposed changes to the procedural rules governing the work of the JCC. The Court convened three private conferences attended by the judges, Clerk Zibel, Counsel Fox and Deputy Clerk David Peck. The purpose of the conferences was to analyze public opinion and make final revisions to the rules. The rules have been made applicable to complaints filed on or after April 1, 2000.

The Chief Justice invited Justice Thayer to recuse himself from the conference on the proposed rules in light of the fact that he had a pending proceeding before the JCC. Justice Thayer declined to disqualify himself and expressed views about the proposed rules which drew heavily on his own experience before the JCC. Some of the justices told investigators that they were uncomfortable with Justice Thayer's free use of his own experience before the JCC to illustrate his comments, but they were not troubled by the comments themselves. They noted that Justice Thayer's comments about the proposed rules were consistent with their own, and thus did not change the outcome of the Court's deliberations.

Justice Thayer's comments regarding proposed procedural rules do not appear to have violated any criminal laws. The proposed rules would not apply to matters then pending before the JCC concerning Justice Thayer. The justices were unable to be specific as to whether Justice Thayer offered comments that were materially different from comments received during the public comment periods. The comments themselves appear to have been substantive, even though they drew extensively on Justice Thayer's personal experiences before the JCC.

## **Attempt to Influence Appointment of Temporary Justices**

Last year Justice Thayer was involved in a divorce case in Hillsborough County Superior Court. Chief Justice Brock and Associate Justices Horton and Broderick were aware of these contentious proceedings and offered their professional collegial support to Justice Thayer, who often commented on the divorce and its impact on him. In light of their professional affiliation with Justice Thayer, all of the other Supreme Court Justices were disqualified from sitting on any appellate cases arising from the *Thayer* divorce trial.

In October 1999, Judith Thayer asked the Supreme Court to issue an emergency stay of a ruling by the trial judge. Because all of the Supreme Court Justices were disqualified from appellate cases involving the *Thayer* divorce, Chief Justice Brock appointed temporary Supreme Court justices to consider Ms. Thayer's request.

RSA 490:3 provides that when a Supreme Court justice is disqualified from sitting on a case, the Chief Justice may appoint a retired Supreme Court justice as a temporary justice. This statute also permits the Chief Justice to appoint a qualified active or retired Superior Court justice as a temporary justice. To facilitate this, the statute provides that, upon request, the Chief Justice of the Superior Court will provide the Chief Justice of the Supreme Court with a list of qualified active and retired Superior Court justices.

Although the statute gives the Chief Justice sole discretion to appoint temporary justices, it was Chief Justice Brock's practice to advise the other Supreme Court justices of his intended appointments and to consider their comments.

Under RSA 490:3, Chief Justice Brock appointed then-Superior Court Chief Justice Joseph Nadeau, current Superior Court Justices Harold Perkins, Larry Smukler, Peter Fauver,



and retired Supreme Court Justice Maurice Bois as temporary justices to hear the matter. The temporary panel denied Ms. Thayer's request for an emergency stay. The Thayer divorce trial then proceeded to a conclusion.

In January 2000, a Notice of Appeal from the final orders in the case of *Thayer v. Thayer* was filed with the Supreme. Because all of the Supreme Court justices were disqualified from sitting on this case, Chief Justice Brock again appointed temporary justices to adjudicate this case. By this time Chief Justice Nadeau was disqualified because he had been nominated as an Associate Justice of the Supreme Court. Justice Bois was also unavailable. Chief Justice Brock decided to re-appoint Justices Perkins, Smukler, and Fauver as temporary justices. He also asked Chief Justice Nadeau to provide him with a list of qualified active and retired Superior Court justices from which he could select replacements for Justices Nadeau and Bois. Chief Justice Nadeau assigned this task to Senior Associate Justice Linda Dalianis.

In late January 2000, before Chief Justice Brock had filled the two vacancies on the temporary panel. Justice Thayer asked Chief Justice Brock, "Do you think we can go with three judges on my divorce panel?" Chief Justice Brock replied, "no," and explained that a three-judge panel would not "look good" to the public or for Justice Thayer.

Shortly after this conversation, Chief Justice Brock left the state to attend a meeting of appellate court chief justices. During his absence, Mr. Zibel received the list of active and retired Superior Court justices who were qualified to sit on the *Thayer* appeal from Justice Dalianis. This list is a public document. It included the names of active Superior Court Justice Phillip Mangones and retired Superior Court Justice George Pappagianis.

On February 3, 2000, Justice Thayer dropped by Mr. Zibel's office to speak with him. He saw the list of Superior Court justices on Mr. Zibel's desk and picked it up and read it. Justice Thayer then told Mr. Zibel, "I don't want Pappagianis on this case." He left Mr. Zibel's office without further comment. Mr. Zibel did not mention Justice Thayer's comment to Chief Justice Brock, who had returned from his conference and was back at the Court on February 3, 2000.

On the afternoon of February 4, 2000, the Supreme Court justices attended a screening conference at which they determined which pending cases would be accepted for appeal. Once this work was completed, they moved on to a counsel agenda. This is a meeting at which the justices discuss various legislative and administrative matters with the Court's Counsel, Eileen Fox. Screening conferences and counsel agenda are confidential meetings. Discussions and comments made during these meetings are not disclosed publicly. Attendance at screening conferences is limited to the justices and attendance at counsel agenda is typically limited to the justices and Ms. Fox.

Prior to the beginning of the screening conference, Chief Justice Brock told Mr. Zibel that he had decided to appoint Superior Court Justice Mangones and retired Superior Court Justice Pappagianis to the special panel sitting in the *Thayer* case. In the mid afternoon, Mr. Zibel called Justices Mangones and Pappagianis to tell them that they had been appointed as temporary justices.

By the time Zibel was calling Justices Mangones and Pappagianis, the Supreme Court justices had started their counsel agenda with Ms. Fox. Also present for this meeting were Chief Justice Brock, and Justices Thayer, Horton, and Broderick. At some point in this

meeting, Chief Justice Brock announced that he had appointed Justices Mangones and Pappagianis to the *Thayer* panel in a way that invited comment.

According to most witnesses, Justice Thayer responded immediately and made several statements. While not all persons interviewed recalled Justice Thayer's exact words, his statements appear to have been, in substance, "Oh no, don't do that. Not Pappagianis." (Ms. Fox). "You can't do that. I don't want Pappagianis on the panel;" and "Just when I thought things were going to work out, this happens." (Chief Justice Brock). Justice Thayer's comments lasted about one minute. Witnesses characterized Justice Thayer's conduct and demeanor as vociferous and constituting a strenuous objection to Justice Pappagianis' appointment to the Thayer divorce panel.

Justice Horton also objected to Justice Pappagianis' appointment. Justice Broderick told Chief Justice Brock that the decision was his and that he had no opinion on the appointments.

After Justices Thayer and Horton objected, Chief Justice Brock said that he had already instructed Mr. Zibel to call Justices Mangones and Pappagianis. He then said that he would see if Mr. Zibel had made the calls and he left the conference room. When Chief Justice Brock arrived at Mr. Zibel's doorway, Mr. Zibel was on the phone with Justice Pappagianis. Mr. Zibel had already told Judge Pappagianis that the Chief Justice had appointed him to the Thayer divorce panel. Mr. Zibel recalled that Chief Justice Brock told him at this time not to call Justice Pappagianis. When interviewed, Chief Justice Brock stated that he did not say this, but rather asked Mr. Zibel if he was on the phone with Justice Pappagianis. Mr. Zibel replied to Chief Justice Brock that he was on the phone with Justice

Pappagianis. Mr. Zibel then told Justice Pappagianis that the Chief Justice needed him and that he would call Justice Pappagianis back.

Chief Justice Brock then informed Mr. Zibel that “Steve and Sherm” objected to Justice Pappagianis’ appointment and that he wanted Mr. Zibel to see if he could “slow this down.” Mr. Zibel told Chief Justice Brock that he had already told Justice Pappagianis that Chief Justice Brock had appointed him to the *Thayer* panel. Chief Justice Brock told Mr. Zibel that he would get back to him about the appointment.

Chief Justice Brock returned to the conference room and asked Justice Thayer to leave the room. When interviewed, Chief Justice Brock stated that he then asked Justice Horton to elaborate on his concerns about Justice Pappagianis, and that Justice Horton did so. Chief Justice Brock then informed the remaining justices and Ms. Fox that Mr. Zibel had already called Justice Pappagianis and that he was a fair man and would be fair to both sides.

Chief Justice Brock had Justice Thayer come back into the conference room and told him that Justice Pappagianis had already been told he was appointed to the panel. The counsel agenda resumed without further comment about the appointments. When the meeting was over, Chief Justice Brock told Mr. Zibel that Justice Pappagianis continued to be his selection to serve on the panel.

### **Court Personnel’s Response to Justice Thayer’s Comment**

Late in the afternoon on February 4, 2000, Ms. Fox met with Justice Broderick to discuss her concerns about Justice Thayer’s comments. She and Justice Broderick agreed that Justice Thayer had acted inappropriately. Justice Broderick told Ms. Fox that he needed

to give the matter more thought and they agreed to continue their discussion the following week.

On or about February 7, 2000, Ms. Fox discussed Justice Thayer's conduct with Mr. Zibel. Mr. Zibel told her what happened when Chief Justice Brock came to his office on February 4. Ms. Fox later met with Justice Broderick who told her that he had decided to speak with each of the justices individually.

During the week of February 7, 2000, Justice Broderick met individually with each of the justices, including Justice Thayer. He told them that he believed Justice Thayer's conduct had been improper and that it could never be allowed to happen again. Justice Broderick told Justice Thayer that what he had done was "over the top" and that it was "exactly what the public [thought the court was] doing." On February 14, 2000, Justice Broderick met again with Chief Justice Brock and advised him that the Court should retain special counsel to assist the justices in determining an appropriate course of action.

Mr. Zibel was also gravely concerned about what had occurred involving the Pappagianis appointment. During the week of February 7, 2000, Mr. Zibel spoke with Ms. Fox and Justice Broderick about his concerns. In the early morning hours of February 11, 2000, he drafted the substance of what was later referred to as the Zibel memorandum.

Later in the day Mr. Zibel gave a copy of the memorandum to Justice Broderick. In his memorandum Mr. Zibel disclosed his belief that he had an ethical duty to report his concerns to the JCC regarding Justice Thayer and the conduct of the Court's business. Justice Broderick told him that he had similar concerns, but felt that the Court should handle the problem itself. Justice Broderick did not discourage Mr. Zibel from filing a complaint

with the JCC. He told Mr. Zibel that he personally would try to work with the Court rather than to make a referral to the JCC.

On Saturday, February 12, 2000, Mr. Zibel called retired justice William Batchelder and asked to visit him. Later in the day Mr. Zibel drove to Batchelder's home and shared a copy of his memorandum with the retired justice. Justice Batchelder did not try to discourage Mr. Zibel from filing a complaint with the JCC.

On Sunday, February 13, 2000, Mr. Zibel made an appointment to speak with Attorney Charles Doleac, an expert on professional ethics. He shared a copy of his memorandum with Attorney Doleac. Mr. Zibel reported that Attorney Doleac did not discourage him from filing his memorandum.

On Monday February 14, 2000, Mr. Zibel told Justice Broderick that he intended to file his memorandum with the JCC on Tuesday, February 22, 2000. Mr. Zibel wanted to share the same information with the Chief Justice. He left a copy of the memorandum with a note asking to meet with the Chief Justice. Later in the day, however, the Chief Justice told Zibel that he understood that Zibel intended to file a complaint with the JCC, and, in light of that fact, he instructed Mr. Zibel that they should not speak further about the complaint.

As previously described, on February 25, 2000, the Chief Justice's counsel delivered a copy of the Zibel memo to Attorney General McLaughlin.

### **Analysis**

The Attorney General concluded that Justice Thayer committed the crimes of improper influence (RSA 640:3, I(b)) and official oppression (RSA 643:1) during the counsel agenda held on February 4, 2000. He planned to seek alternative indictments on these

charges against Justice Thayer at a special session of the Merrimack County Grand Jury that was scheduled to convene on March 30 and 31.

The Attorney General determined that Chief Justice Brock did not commit any chargeable offenses. Under the improper influence statute, Chief Justice Brock was required to report Justice Thayer's attempt to influence him to a law enforcement officer. (RSA 640:3, I(c)). Chief Justice Brock satisfied this requirement when his lawyer reported Justice Thayer's conduct to the Attorney General by delivering the Zibel memorandum to him.

The Attorney General concluded that Chief Justice Brock violated New Hampshire law by listening to Justice Thayer's comments about the Pappagianis appointment. RSA 495:1 prohibits a judge from listening to the statement of a party except in open court or in the presence of all of the parties to the action. However, a violation of this statute is not a crime.

### **Threats to Chief Justice Brock and Justice Broderick**

On the afternoon of February 14, 2000, Justices Horton, Broderick and the Chief Justice scheduled a meeting the next day with Attorney Charles Leahy for the purpose of seeking legal advice with respect to these developments. Justices Brock and Broderick agreed that Justice Broderick should call Justice Thayer at his home that evening as a courtesy.

Justice Broderick summarized portions of the Zibel memorandum for Justice Thayer. Justice Thayer reacted with anger and dismay. Justice Thayer told Justice Broderick, "If Zibel files that I'm done. It's over for me." Later he said, "We all do it. We can either hang together on this or hang separately." Justice Broderick recommended that Justice Thayer

read the memorandum, and offered to ask Chief Justice Brock to send a copy to Justice Thayer's home by facsimile machine. After he finished speaking with Justice Thayer, Justice Broderick commented to his wife that Justice Thayer had threatened him during their conversation.

Justice Broderick then called the Chief Justice who agreed to transmit the Zibel memorandum to Justice Thayer. Justice Thayer called Justice Brock before the Zibel memorandum was sent. During the conversation they commiserated about the fact that they both assumed that their comments during judges' conferences were confidential. He gave the Chief Justice the impression that he hoped someone could talk Mr. Zibel out of filing his memorandum. The Chief Justice told him that there was not anyone who could do that. Justice Thayer then told him, "If Zibel files this it's going to blow up the Supreme Court and I'm not going to hang alone." The Chief Justice told Justice Thayer that the Court would also file a report with the JCC.

The next morning, Tuesday, February 15, 2000, Justice Thayer called the Chief Justice twice. Justice Thayer repeated, that if the Zibel memorandum were filed "We have a problem. I'm not hanging alone. If any complaint is filed it'll blow the place up." The Chief Justice said that he took the comments as a personal threat to himself as well as a threat against the institution.

### **Analysis**

The Attorney General concluded that Justice Thayer's comments to the Chief Justice formed the basis for charges of witness tampering (RSA 641:5) and obstructing government



administration (RSA 642:1). He planned to seek alternative indictments on those charges against Justice Thayer at the special session of the Merrimack County Grand Jury.

## **Conclusion**

On March 27, 2000, the Attorney General's office sent Justice Thayer a letter informing him that he was the target of a grand jury inquiry, and inviting him to appear before the grand jury to answer its questions. On March 28, 2000, Justice Thayer's attorneys approached members of the investigative team and asked the Attorney General's Office to consider alternative dispositions of the investigation. On March 29, 2000, Justice Thayer offered to submit his resignation from the Supreme Court in return for the Attorney General's forbearance from presenting criminal charges against him to the grand jury.

The Attorney General accepted Justice Thayer's offer for several reasons. First, his investigation had found that Justice Thayer's comments to the court had, in essence, been invited by the Chief Justice's demeanor and the Court's past practice. Second, the State could reasonably expect that there would be litigation risks in carrying the proposed charges to trial. Third, given the nature of the offenses and Justices Thayer's long public service, the State would neither ask for nor expect to receive a sentence of incarceration in the event that Justice Thayer was convicted. And, most importantly, Justice Thayer expressed through counsel that he mostly wished, to the extent possible, to preserve the honor of the Court. For all these reasons the Attorney General decided to accept Justice Thayer's offer.

The Attorney General determined that no other Supreme Court justice or other Court personnel violated a criminal law. Therefore, this investigation has been closed. Given the long-standing practices of the Supreme Court revealed by this investigation, it is the

obligation of the Attorney General to fully report these matters to the citizens of New Hampshire and their elected representatives.

## Appendices

### Constitutional Provisions

#### *Part I Art. 35*

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme judicial court should hold their offices so long as they behave well; subject, however, to such limitations, on account of age, as may be provided by the constitution of the state; and that they should have honorable salaries, ascertained and established by standing laws.

### Statutes

#### *§ 495:1. Statements to Judges.*

No judge, justice, magistrate, county commissioner or commissioners in whose court or before whom any suit at law or in equity, petition or other proceeding is pending or to be heard or tried shall listen to any statements in regard thereto, except in open court or in the presence of all parties thereto.

#### *RSA § 495:2. Contempt.*

Any person who shall make any statements in regard to the merits of any such cause, suit or proceeding to any judge, justice, magistrate or county commissioner, except in open court or in the presence of all parties, shall be deemed guilty of contempt and shall be fined not more than \$50.

#### *Improper Influence RSA 640:3*

I. A person is guilty of a class B felony if he:

(a) Threatens any harm to a public servant, party official or voter with the purpose of influencing his action, decision, opinion, recommendation, nomination, vote or other exercise of discretion; or

(b) Privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law; or

(c) Being a public servant or party official, fails to report to a law enforcement officer conduct designed to influence him in violation of subparagraph (a) or (b) hereof.

II. "Harm" means any disadvantage or injury, pecuniary or otherwise, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official, or voter is interested.

*Official Oppression RSA 643:1*

A public servant, as defined in RSA 640:2, II, is guilty of a misdemeanor if, with a purpose to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office; or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

*Witness Tampering RSA 641:5*

A person is guilty of a class B felony if:

I. Believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:

(a) Testify or inform falsely; or

(b) Withhold any testimony, information, document or thing; or

(c) Elude legal process summoning him to provide evidence; or

(d) Absent himself from any proceeding or investigation to which he has been summoned; or

II. He commits any unlawful act in retaliation for anything done by another in his capacity as witness or informant; or

III. He solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in paragraph I.

*Obstructing Government Administration 642:1*

A person is guilty of a misdemeanor if he uses force, violence, intimidation or engages in any other unlawful act with a purpose to interfere with a public servant, as defined in RSA 640:2, II, performing or purporting to perform an official function; provided, however, that flight by a person charged with an offense, refusal by anyone to submit to arrest or any such interference in connection with a labor dispute with the government shall be prosecuted under the statutes governing such matters and not under this section.

## **Documents**